88-1992

Supreme Court, U.S.
FILED
JUN 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1988

ALCOLAC, INC.,
Petitioner,
vs.
BETTY ELAM, et al.,
Respondent.

Volume II
APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

Alvin D. Shapiro*
LAW OFFICE OF ALVIN D. SHAPIRO
911 Main Street, Suite 2830
Kansas City, Missouri 64105
(816) 474-6824

Thomas E. Deacy, Jr.
DEACY & DEACY
1000 Bryant Building
1102 Grand Avenue
Kansas City, Missouri 64106
(816) 421-4000

H. Gregory Skidmore
SKIDMORE & WILKINSON
103 South Centre Street
Cumberland, Maryland 21502
(301) 724-3424

Attorneys for Petitioner

*Counsel of Record

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

No. 71296
WD 38105

IN THE SUPREME COURT OF MISSOURI
January Session 1989

Betty L. Elam, et al.,
Respondents-Appellants,

vs. TRANSFER

Alcolac, Inc.,
Appellant-Respondent.

Now at this day, on consideration of Appellant-Respondent's Application to transfer the above entitled cause from the Western District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

COVINGTON, J., NOT PARTICIPATING

STATE OF MISSOURI—SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session thereof, 1989, and on the 14th day of March 1989, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 14th day of March, 1989.

/s/ Thomas F. Simon Clerk.

(Filed January 11, 1989)

IN THE SUPREME COURT OF MISSOURI

No. 71296
Consolidated

BETTY L. ELAM, CLARENCE ELAM and LINDA LOU SANDERS, ETHEL M. BERRY, CARL C.* and JACQUELINE BERRY, VIRGIL and DOROTHY BRADLEY, EDWARD and MALVA GEHLKEN, DAINIE and MARY LUCETTA LANDON,* GWENDOLYN and JOHN C. LAWRENCE, GLEN A. and BERNICE MILLER, CHARLOTTE A. and JOHN PHILLIPS, DANIEL CHARLES and JOYCE PRYOR and AMBER CROSS, ARNOLD L., JOY R., JOYCE and TAMMY SOMMERS, JAMES R., KAY D., WILLIAM LANCE, LISA and LYLE TURLEY, GENEVIEVE and RALPH H. WITHERS,

Respondents-appellants,

vs.

ALCOLAC INC.,

Appellant-respondent.

---

*Died during pendency of appeal; spouse substituted as party by order.

APPLICATION TO TRANSFER TO SUPREME COURT

Index | Page

Nature of case 2

(a) Original jurisdiction; constitutional and rule-making issues 2

(b) Contrary to previous appellate decisions *Artstein v. Pallo; Zafft v. Lilly* 4

(c) Important questions; widespread general interest; 5

Comes now appellant-respondent Alcolac Inc. ("defendant"), and, pursuant to Art. V., §§ 3, 10 and 11, Mo. Const., and to Rules 83.03 and 83.04, Mo.R.Civ.P., applies to the Court to order transfer of this matter to itself. As grounds, defendant states:

1. On November 1, 1988, the Missouri Court of Appeals, Western District, issued its Opinion herein. On December 27, 1988, said Court issued its Order overruling defendant's motion for rehearing, made pursuant to Rule 84.17, Mo.R.Civ.P., and denying application to transfer to this Court, made pursuant to Rule 83.02, Mo. R.Civ.P. Pursuant to said Rule 83.04, filed herewith are copies of the Court of Appeals' opinion (Ex. "A"); said Court's Order (Ex. "B"); and the Motion for Rehearing (with supporting suggestions) and Application To Transfer (with supporting suggestions) (Exs. "C-1" and "C-2").

2. *Nature of Case*: These are "toxic tort" claims by 31 present or former residents of Pettis County. Defendant owns a chemical plant just outside Sedalia. Jury trial in Jackson County Circuit Court in 1985 took 4-1/2

months. The jury returned identical verdicts for each of the 31 plaintiffs: $200,000 compensatory damages, $1,387,096.70 punitive damages, totalling some $49 million. The trial court ordered a new trial on damages only, based in part on constitutional grounds. The Court of Appeals affirmed such order, but on different grounds.

3. Transfer should be ordered to this Court because: (a) this Court has *original jurisdiction*, in that provisions of the Missouri constitution and this Court's rule-making authority are directly involved; (b) the Court of Appeals' opinion is *contrary to previous appellate decisions;* and (c) there exist *important questions* and *widespread general interest.*

(a) *Original jurisdiction; constitutional and rule-making issues*: This matter involves provisions of the Missouri constitution (and federal constitution provisions, hereafter identified) of which the Court has original jurisdiction under Art. V, § 3, Mo. Const., requiring transfer to it, Art. V, § 11, Mo. Const. Although it acknowledges it has no jurisdiction to do so, p. 358, Ex. "A", the Court of Appeals reverses both the trial court's holding that use of MAI 10.02 was unconstitutional, and that the punitive damage submission was otherwise unconstitutional. The Court of Appeals rules defendant is liable for punitive damages, pp. 360, 370, Ex. "A", raising state constitutional issues under Art. I, § 2 (equality under law); Art. I, § 10 (due process); Art. I, § 13 (*ex post facto laws*); Art. I, § 14 (open courts); Art. I, § 21 (excessive fines); Art. II, § 1 (separation of powers), and Art. V, § 5 (Supreme Court rulemaking); and federal constitutional issues under Amdt. VIII (excessive fines) and Amdt. XIV, § 1 (due process, equal protection), U.S. Const. The Court of Appeals' imposition of

liability for punitive damages, with its directed assessment of open-ended damages

(i) Violates due process and equality under law requirements by delegating to a civil jury, under a civil burden of proof, penal functions of vague and unlimited nature, Art. I, §§ 2 and 10, Mo. Const.; Amdt. XIV, § 1, U.S. Const.; according to the Court of Appeals, p. 358, Ex. "A", MAI 10.02 may *only* be reviewed by the Supreme Court which promulgated it, Art. V, § 5, Mo. Const.;

(ii) Violates due process by impacting on defendant's right to open courts;* since applied only to civil defendants faced with punitive damages, also violates guarantees of equality under law, Art. I, § 2; Art. I, § 10; Art. I, § 14 (open courts), Mo. Const.; Amdt. XIV, § 1, U.S. Const. (due process, equal protection);

(iii) Violates constitutional prohibition of "excessive fines," Art. I, § 21, Mo. Const.; Amdt. VIII, U.S. Const.;**

(iv) Violates constitutional guarantees of due process, and is akin to an *ex post facto* law in that the Court of Appeals effects a radical change in common law standards of causation and of submissibility of claims, based on conduct of up to ten years past, which applied

---

*The U.S. Supreme Court refers to this as a "chilling effect" on the right to access to the courts arising from use of unlimited punitive damages, *Bankers Life & Cas. Co. v. Crenshaw*, U.S. , 108 S.Ct. 1645, 100 L.Ed.2d 62 (1988), at 70, fn. 1; and Justice O'Connor's concurrence, *id.* at 77.

**The U.S. Supreme Court has now agreed to hear this specific issue, *Browning-Ferris Inds. v. Kelco Disposal, Inc.*, No. 88-556, cert. granted December 5, 1988. A decision would ordinarily issue in about July, 1989. If transfer to this Court is ordered, the benefit of such ruling would be available.

retroactively gave no advance notice of liability for punitive damages; changes burden of proof, which is now imposed upon defendant, requiring it to disprove claims, Art. I, § 10 (due process); Art. I, § 13 (*ex post facto* laws), Mo. Const.; Amdt. XIV, § 1, U.S. Const. (due process);

(v) Radically changes common law standards of causation and of submissibility of plaintiffs' claims, being judicial legislation in violation of Art. II, § 1, Mo. Const., (separation of powers, law-making solely a legislative function).

(b) *Contrary to previous appellate decisions*: (1) The Court of Appeals' opinion is contrary to this Court's decisions including and represented by *Artstein v. Pallo,* 388 S.W.2d 877 (Mo. banc 1965):

(i) In remanding for new trial solely on the issue of damages by reason of inflammatory and prejudicial material and argument, resulting in bias and prejudice by the jury, pp. 326-336, 348, Ex. "A", the Court of Appeals ruled contrary to *Artstein* and similar cases that such remand *must* be for retrial on *all* issues, not just on damages; the inflammatory and prejudicial material is deemed to infect and pervade the jury's consideration of *all* issues, not damages alone;

(ii) In apparently ruling that liability for punitive damages was established, the Court of Appeals ruled contrary to this Court's requirement that on retrial for punitive damages, retrial on *all* issues is necessary to establish liability for the basic tort, *Panjwani v. Star, etc.,* 395 S.W.2d 129 (Mo. 1965);

(iii) The Court of Appeals holds, p. 332, Ex. "A", proof of liability elements is "intertwined" with

proof of damage. Where such "intertwining" is the case, new trial must be on *all* issues, *Schoor v. Wilson,* 731 S.W.2d 308, (Mo. App. 1987).

(2) *Zafft v. Lilly:* Acknowledging a complete lack of specific proof, p. 260, Ex. "A", the Court of Appeals excuses such failure by ruling defendant had failed to monitor its own emissions, and was thus responsible for such defects of proof, pp. 261, 263, Ex. "A"; it holds plaintiffs' proof, which the Court of Appeals concedes is deficient, made a submissible case. Such ruling is contrary to *Zafft v. Lilly,* 676 S.W.2d 241, 246-7 (Mo. banc 1984), in which this Court specifically refused to shift the burden of proof, either on causation or identification of the injury-causing agent.

(c) *Important questions; widespread general interest:* This is the first jury-tried multi-claim "toxic tort" case in Missouri to reach this appellate level. Jury trial took 4-1/2 months; the punitive damage verdicts totalled some $43 million. The Court of Appeals' remand for new trial will occupy a court and jury, lay and expert witnesses, and the parties for many months. The issues to be retried should be reviewed by this Court now, rather than after expenditure of substantial judicial sources below.

(i) *Important questions:*

A. Radical new standards of causation and of submissibility, including a new judicially-fashioned formula for measuring submissibility of toxic tort claims, pp. 259, 368-9, Ex. "A", deviating from all previous standards of tort proof;

B. Total revision of all previously-held concepts of the rules of evidence, relating to (1) rele-

vancy, materiality, and proper foundation; and (2) standards for expert testimony and latitude allowed expert opinion;

C. MAI 10.02 is in daily use in Missouri courts; the trial court held it unconstitutional, but while the Court of Appeals ruled the Supreme Court alone could decide this, it reversed the trial court's determination of unconstitutionality, p. 358, Ex. "A". The constitutionality of punitive damages is now before the U.S. Supreme Court, see footnote, p. 4, *supra*.

(ii) *Widespread general interest*: *A.* Extensive coverage by media of this case specifically (*e.g.*, New York Times), and of mass toxic tort claims generally (*e.g.*, Time Magazine, etc); *B.* Involvement of Missouri Department of Natural Resources; and *C.* Increasing amount of "toxic tort" claims; substantive, procedural and evidentiary aspects should be reviewed and defined by Supreme Court.

Law Office of Alvin D. Shapiro
By /s/ Alvin D. Shapiro
Alvin D. Shapiro - 17807
911 Main Street, Suite 2830
Kansas City, Missouri 64105
(816) 474-6824

Deacy & Deacy
Thomas E. Deacy, Jr. - 12539
1000 Bryant Building
1102 Gand Avenue
Kansas City, Missouri 64106
(816) 421-4000

Law Office of H. Gregory Skidmore
H. Gregory Skidmore
103 South Centre Street
Cumberland, Maryland 21502
(301) 724-3424

Woodley Law Office
Patrick A. Woodley - 31459
210 Commercial
Post Office Box 1333
Warsaw, Missouri 65355
(816) 438-5601

Attorneys for Appellant-Respondent

MISSOURI COURT OF APPEALS
Western District
1300 Oak Street
Kansas City, MO. 64106—2970
Peggy Stevens McGraw — Area Code 816
Clerk-Docket Attorney — 474-5511

December 27, 1988

IMPORTANT NOTICE

TO: ALL ATTORNEYS OF RECORD

RE: ELAM, BETTY, ET AL (RESP-APP), RESPONDENT vs. ALCOLAC, INC. (APP-RESP), APPELLANT

WD# 38105

Please be advised that APPELLANT's motion for rehearing was overruled and motion for transfer to Supreme Court was denied. See Rule 83.03.

Peggy Stevens McGraw
Clerk-Docket Attorney

cc: Lantz Welch
Alvin D Shapiro

(Filed November 16, 1988)

IN THE
MISSOURI COURT OF APPEALS
WESTERN DISTRICT

Case No. WD 38105

BETTY ELAM, et al.,
Respondents-appellants,

v.

ALCOLAC INC.,
Appellant-respondent.

MOTION FOR REHEARING, OR, IN THE ALTERNATIVE, MOTION FOR TRANSFER TO ENTIRE COURT OF APPEALS EN BANC

Comes now Alcolac Inc., appellant-respondent herein, and (a) pursuant to Rule 84.17, Mo.R.Civ.P., respectfully moves the Court to order a rehearing herein; or, in the alternative, (b) respectfully moves the Court to transfer this matter to the entire Court of Appeals, Western District, *en banc*. As grounds therefor, appellant-respondent states:

1. The Court has overlooked or misinterpreted the following material matters of law and fact, as shown by its opinion:

(a) In remanding for a new trial on both compensatory and punitive damages by reason of inflammatory and prejudicial material and argument, pp. 326, 333, 335, 348, Court's opinion, resulting in bias and prejudice by the jury, see pp. 326-336, 348, Court's opinion, the Court

has overlooked or misinterpreted the clear requirement of *Artstein v. Pallo*, 388 S.W.2d 877, 882 (Mo. banc 1965) that such remand *must* be for retrial on *all* issues, and not just on damages; the inflammatory material is deemed to have infected and pervaded the jury's consideration of *all* issues, requiring re-trial on *all* issues, not on damages alone. *Artstein v. Pallo, id.; Deaner v. Bi-State Dev. Agency*, 484 S.W. 2d 232, 233 (Mo. 1972); *Stubbs v. K.C. Terminal Rwy. Co.*, 427 S.W. 2d 257, 260 (Mo. App. 1968). Further, in apparently ruling liability for punitive damages is established, p. 370, Court's opinion, the Court overlooked the requirement that on re-trial for punitive damages, re-trial on *all* issues is necessary to establish liability for the basic tort, *Panjwani v. Star Service & Petroleum Co.*, 395 S.W.2d 132-3 (Mo. 1965).

(b) In creating and setting forth entirely new, radical standards for causation and for submission in respect to "toxic tort" claims, the Court has overlooked or misinterpreted the following:

(i) The effect of its decision is to shift the burden of proof entirely to a defendant, requiring it to disprove claims made against it; the Court cites no authority for such a shift, and it is unconstitutional;

(ii) Although conceding a complete lack of particularity of the proof ordinarily required for "toxic tort" claims in all other jurisdictions, p. 260, Court's opinion, the Court nevertheless justifies submission by contending such manifest lack of particularity is due to and thus excused by defendant's failures and omissions to monitor, and to generate records, p. 261, Court's opinion; the Court cites no authority—nor is there any—for these "facts" to justify a failure of proof or lack of evidence by a plaintiff. Further, the Court has failed to consider

the implications of such rationale, in that inquiry as to sufficiency of proof would now be focussed on a defendant's failure to monitor or on similar acts, instead of the heretofore required focus on whether sufficient proof has been evinced to submit a plaintiff's claim;

(iii) The Court's new standards for submissibility and for causation are set forth without consideration of the laws or rules of evidence, and serve to completely alter all previously-held concepts of relevancy, materiality and proper foundation. For example, the Court's discussion and approval of plaintiffs' "neighbors" or "non-litigants" testimony, pp. 68-71, Court's opinion, omits any consideration, discussion or ruling on whether this type of evidence, all admitted without foundation and without satisfying previously-held concepts of relevancy and materiality, can be adduced under what was heretofore deemed the rules or laws of evidence; by allowing this type of proof, the Court has overlooked or misinterpreted its drastic alteration of previously-settled concepts of evidence, one of the effects of which is to require a defendant to explain or disprove immaterial or irrelevant evidence.

(iv) The Court asserts, p. 261, Court's opinion, the admitted lack of particularity of proof of identity of any toxic substances, referred to in (ii) above, can be supplied by circumstantial evidence. This significant proposition is bottomed on *Roehling v. Natl. Gypsum*, 786 F.2d 1225 (4th Cir. 1986), and *Drayton v. Jiffee Chem. Corp.*, 395 F. Supp. 1081 (N.D. Ohio 1975). The Court misinterprets these cases, neither of which support application of the asserted proposition to this case;

(v) Not even the doctrine of *res ipsa loquitur* ever went so far as does the Court's opinion, or

departed so extremely from previously-held rules of causation and of submissibility. *Res ipsa* permits, under certain circumstances, an inference of negligence by a defendant, but never dispenses with the requirement that plaintiff prove all other elements, such as causation, and injury or damage resulting from the tort. The Court's opinion has substantially altered all these elements.

(vi) The Court's creation of new, radical standards of causation and of submissibility rests in large part on its reading of the "substantial factor" doctrine, pp. 249-261, Court's opinion. *In Re Bendectin Litigation*, 857 F.2d 290 (6th Cir. 1988), appeared in the advance sheets the day before the Court issued its opinion and was undoubtedly unavailable to the Court. *Bendectin* treats many of the same authorities cited by the Court in respect to the "substantial factor" doctrine, and reaches an opposite conclusion, *id.* at 310, 311, and shows the Court misapplied the "substantial factor" test. Thus, this Court was unaware of *Bendectin*, and a re-hearing should be ordered so as to reconsider the Court's opinion in this respect in the light of it.

(vii) *Giles*, *Chism* and *Ricketts*, Missouri cases cited by the Court in applying the "substantial factor" test of causation in this case, are inapposite and cannot be used in support.

(viii) Although extensively citing and relying on *Allen v. U.S.*, 588 F. Supp. 247 (D. Utah 1984), later reversed by the Tenth Circuit, 816 F.2d 1417 (10th Cir. 1987), the Court has misinterpreted *Allen* in at least the following respects: (i) *Allen*'s use of "substantial factor" for causation is only after each plaintiff was required to identify and quantify (*i.e.*, how much exposure, or "dose" was received) the toxic agent to which he

claimed exposure (here, the Court virtually dispenses with the need for such evidence), 588 F.Supp. at 428-9; and (ii) *Allen* relied on *Sindell*, *id.* at 408-9, and *Summers v. Tice*, *id.* at 407, 410-411, to support causation; both cases were rejected by the Missouri Supreme Court in *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 244 (Mo. banc 1984).

(ix) The Court's new five-step test for proof of toxic torts, p. 259, Court's opinion, is patently based on no judicial authority; it is judicial legislation. For example, its fourth step ["expert opinion that the disease found in plaintiff *is consistent* with exposure to the harmful substance"] drastically reduces all previous requirements of tort or medical proof.

(c) In remanding for a new trial on actual damages, the Court appears to foreclose defendant from then contesting the nature and extent of plaintiff's injuries, p. 369, Court's opinion. The Court clearly overlooked the rule of law that on re-trial, defendant cannot be precluded from contesting the nature and extent of any such injuries and the damages flowing therefrom; the verdicts can only be deemed to establish the fact of injury, not the nature and extent thereof, *Herrera v. Reichers*, 608 S.W.2d 539 (Mo. App. 1980).

(d) In apparently ruling appellant-respondent is liable for punitive damages, without a predicate finding of actual compensatory damages, the Court overlooked the clear requirement that an amount of compensatory damages must first be found before there can be liability for punitive damages. If the Court has ruled there is liability for punitive damages without first requiring a verdict finding an amount of compensatory damages, the Court has overlooked well-settled law re-

quiring such predicate finding. MAI 10.02; *State ex inf. v. Kansas City Firefighters*, 672 S.W. 2d 99, 126 (Mo. App. 1984).

(e) In reversing the trial court's ruling as to the unconstitutionality (by reason of being an "excessive fine", Art. I, § 21, Mo. Const., and by reason of the due process violation inherent in use of a civil burden of proof to punish and deter, by open-ended punitive damages, Art. I, § 10, Mo. Const.) of the punitive damage submission, and in then apparently ruling appellant-respondent is nevertheless liable for punitive damages in an amount to be determined on re-trial, the Court has overlooked or failed to consider the direct involvement of said Art. I, § 21, and of said Art. I, § 10, to this appeal, requiring it to be transferred to the Supreme Court, which has exclusive jurisdiction of such constitutional issues, Art. V, § 3, Mo. Const.

(f) The Court's apparent ruling that appellant-respondent is liable for punitive damages also results in violation of the federal constitution, Amdt. VIII (excessive fines), and Amdt. XIV, § 1 (due process; equal protection), U.S. Const., as set forth in the Application To Transfer, filed this date.

2. This motion is in the alternative to appellant-respondent's Application to Transfer to Supreme Court, filed contemporaneously herewith.

Law Office of Alvin D. Shapiro
By /s/ Alvin D. Shapiro
Alvin D. Shapiro - 17806
911 Main Street
2830 Commerce Tower
Kansas City, Missouri 64105
(816) 474-6824

Woodley Law Office
Patrick A. Woodley - 31459
210 Commercial
Post Office Box 1333
Warsaw, Missouri 65355
(816) 438-5601

Law Office of H. Gregory Skidmore
H. Gregory Skidmore
103 South Centre Street
Cumberland, Maryland 21502
(301) 724-3424

Attorneys for Appellant-Respondent

CERTIFICATE OF SERVICE

This is to certify copies of the above and foregoing appellant-respondent's Motion for Rehearing, Or, In the Alternative, Motion for Transfer to Entire Court of Appeals *En Banc*, and Suggestions In Support thereof, were hand-delivered this 16th day of November, 1988, to Attorneys for Respondents-Appellants:

Lantz Welch
Tim Brake
2930 City Center Square
Post Office Box 26005
Kansas City, Missouri 64196

Charles Fairchild
Clem Fairchild
4500 Main Street
Kansas City, Missouri 64111

/s/ Alvin D. Shapiro
Attorney for Appellant-Respondent

(Filed November 16, 1988)

IN THE
MISSOURI COURT OF APPEALS
WESTERN DISTRICT

Case No. WD 38105

BETTY ELAM, et al.,
Respondents-appellants,

v.

ALCOLAC INC.,
Appellant-respondent.

SUGGESTIONS IN SUPPORT OF MOTION FOR REHEARING, OR, IN THE ALTERNATIVE, MOTION FOR TRANSFER TO ENTIRE COURT OF APPEALS EN BANC

Tracking the points raised in our *Motion for Rehearing*:

(a) The Court rules that material and argument in respect to "increased risk of cancer", pp. 318-328, Court's opinion, and in respect to "chemically-induced AIDS", pp. 333-336, were improper, erroneously placed before the jury, "inflammatory and prejudicial", p. 333, wrongfully used before the jury to "exhort damages - actual and punitive", p. 326, and were "prejudicial to the verdicts", p. 348. Yet the Court's decision is to affirm the jury's verdict on liability, and to remand for new trial solely on the issue of damages, actual and punitive. In doing so, the Court patently overlooked the clear requirements both of the Supreme Court and of this Court

that re-trial *must* be had on *all* issues, not on damages alone.

The Court clearly overlooked *Artstein v. Pallo*, 388 S.W. 2d 877 (Mo. banc 1965). In *Artstein*, the trial court granted a motion for new trial only as to damages. The jury had found for a wealthy plaintiff, severely injured in a car accident, but had awarded only $500 damages. Bias and prejudice were clearly evident. While acknowledging the trial court was acting on plaintiff's motion for a new trial on the issue of damages only, the Court held:

> Where passion, prejudice or misconduct on the part of the jury affects the trial of one issue, the judgment and verdict must be set aside entirely and a new trial granted on all issues even though the plaintiff moves for a new trial on the issue of damages only [citations omitted]. The trial court abused its discretion in limiting the new trial to the issue of damages only.

388 S.W.2d at 882. In reaching its decision, the *Artstein* court ruled a new trial on *all* issues must be granted, because the bias and prejudice prevented the jury from making a "proper determination of liability", *id.* The Court quoted from *Taylor v. St. Louis P.S. Co.*, 303 S.W.2d 608, 612 (Mo. 1957):

> We have the view, therefore, that it may not be soundly argued that inasmuch as the jury found the defendant liable for plaintiff's injury there was no passion, prejudice or misconduct involved in arriving at the 'liability portion' of the verdict. The fallacy in such an argument is that merely because plaintiff was not prejudiced by the liability portion

> of the verdict does not mean that it was not pervaded by the same misconduct and actuated by the same passion and prejudice as was the 'damage portion' of the verdict.

388 S.W.2d at 882. Bias and prejudice, resulting from the inflammatory and prejudicial material and argument, vitiates the entire verdict and requires a new trial on all issues, *Deaner v. Bi-State Dev. Agency*, 484 S.W.2d 232, 233 (Mo. 1972).

Similarly, in *Stubbs v. K.C. Terminal Rwy. Co.*, 427 S.W.2d 257 (Mo. App. 1968), this Court explained that the difference (as to granting a new trial on just one issue or on all issues) is that where the verdict is deemed simply to be excessive, no new trial on liability is made necessary. However, where the damages verdict results from bias, passion and prejudice, determination of liability has been affected or tainted as well. Citing *Artstein*, *supra*, and quoting from *Skadal v. Brown*, 351 S.W.2d 684, 689 (Mo. 1961), this Court stated the bias, passion and prejudice "vitiates the entire verdict, not only as to the amount of the award but also as to the determination of liability", 427 S.W.2d at 260. See also *Jones v. Penna. R. Co.*, 182 S.W.2d 157, 159 (Mo. 1944).

It is also clear that where the facts pertaining to damages and to liability are so inextricably interwoven —as here—a new trial cannot be ordered on damages alone, but must be on *all* issues. In this Court's recent decision in *Schoor v. Wilson*, 731 S.W.2d 308 (Mo. App. 1987), this Court found error as to the damages aspect but ordered a new trial on all issues. Judge Gaitan stated:

> Where the facts pertaining to damages and liability are so interwoven and liability is contested,

> it is prejudicial to not award a new trial on all issues.

Id. at 314. The Court cited *Owens v. ARB*, 544 S.W.2d 26 (Mo. App. 1976), and *Thomas v. Durham Mtrs.*, 389 S.W.2d 412 (Mo. App. 1965), in support of this holding.

As noted elsewhere in these alternative motions, it appears the Court holds liability for punitive damages is established, with re-trial on punitive damages limited to determination of amount only. If so, the Court has clearly overlooked the requirement that such re-trial must entail proof of all facts necessary to establish tort liability as well. In *Panjwani v. Star Service & Petroleum Co.*, 395 S.W.2d 129, 132-3 (Mo. 1965), the trial court ordered a new trial solely on the issue of damages, both actual and punitive. The Supreme Court reversed and remanded for a new trial *on all issues*, stating:

> . . . it would appear to be impossible for the jury to adequately appraise the claim of damages, especially punitive damages, without full proof of all facts necessary to establish liability for the basic tort in the first instance.

Id. at 133. See also *Redican v. K-Mart*, 734 S.W.2d 864, 870, (Mo. App. 1987) [Judge Turnage].

(b) The Court's creation and declaration of entirely new, radical standards for submissibility and for causation in respect to toxic tort claims*, caused it to over-

---

*It cannot be doubted that by this decision, the Court rewrites the law of negligence, evidence and burden of proof in the State of Missouri. The Court applies this radical, new law to conduct which occurred up to ten years past. These are steps which heretofore no Missouri court has been willing to take. After stating usual tort rules do not apply to "toxic

(Continued on following page)

look the considerable "fall-out", or implications, of so momentous a decision. A few of the more significant aspects of that "fall-out", which the Court clearly overlooked, are:

(i) A complete, radical shift of the burden of proof from a "toxic tort" plaintiff to a defendant. In instance after instance, the Court's opinion casts upon defendant the burden of explaining, proving or disproving, or justifying. For example, the Court acknowledges the ubiquitous presence of chemicals in our everyday lives. Yet it rules a plaintiff need only identify use of a toxic material in a defendant's manufacturing process, and requires no further showing of that toxic chemical's emission or that it has had a chronic impact on plaintiff. Rather, it is defendant who is required to show the toxic material has not been emitted, and/or the presence of the other everyday chemicals were such as to rule out the toxic material from being a "substantial factor" in causing any injury to plaintiff. The Court clearly overlooked more searching inquiry into this aspect of its decision, the radical shift of the burden of proof.

(ii) Repeatedly, the Court acknowledges a complete lack of specific proof by plaintiffs. An example appears at p. 260, Court's opinion:

Footnote continued—

tort" claims, p. 250, Court's opinion, the Court sets about to create new standards. For example, the Court sets forth the standard of causation the law expects in "the greater number of cases", p. 254, Court's opinion. It then rejects this requirement, calling it "particularistic evidence of causation", and proceeds to open the floodgates of what would be deemed irrelevant, incompetent evidence in any other case. Liability is thus imposed despite the "indeterminacy" of causation, which, the Court states, is merely an instrument of policy, p. 255, Court's opinion.

> Indeed, no witness - expert or lay - could identify the particular chemical at a particular exposure, the particular concentration of the chemical, the particular dosage of the chemical taken in bodily, or the particular duration of the exposures.

Yet all aspects of this admitted failure of proof are excused by blaming defendant, either for a lack of monitoring or for other acts supposedly making this evidence "unavailable." It appears the Court has overlooked the implication of this result, which will clearly be to change focus of inquiry from the sufficiency of a plaintiff's proof to whether or not a defendant is responsible for the unavailability of a plaintiff's admitted lack of proof. (*Quaere*: If, as the Court says, this defendant's negligence was so pervasive as to poison the environment, why could plaintiffs have not supplied the deficiencies the Court lists above?)

(iii) The Court clearly overlooked consideration of the results of its decision as they pertain to the laws or rules of evidence. This is particularly notable in respect to plaintiffs' "non-litigant" or "neighbor" witnesses, pp. 68-71, Court's opinion. In the face of all known concepts of relevancy, materiality and proper foundation, evidence was admitted as to mangy dogs, itchy cats, dying bees, curled leaves, etc.—many substantial distances from defendant's premises. The Court's 374-page opinion devotes no consideration at all to the evidentiary aspects of this. Instead, all notions of relevancy, materiality, proper foundation are either obliterated or turned on their heads, resulting in approval of this type of evidence. It patently appears the Court has overlooked the impact of such rulings on the rules or law of evidence.

(iv) To supply what it concedes are the numerous deficiencies of particularity in the proof of identity of any toxic substances, referred to in (ii) above, the Court says, at p. 261, circumstantial evidence suffices, and relies on *Roehling v. Natl. Gypsum*, 786 F.2d 1225 (4th Cir. 1986) and *Drayton v. Jiffee Chem. Co.*, 395 F. Supp. 1081 (N.D. Ohio 1975). The Court clearly misinterprets these cases in that both cases involved known, identified agents clearly capable of causing the subject injury.

(v) The Court's new standards for submissibility go far beyond even the liberal doctrine of *res ipsa loquitur*. *Res ipsa* allows an inference of negligence in appropriate cases and places the burden of negating such inference on defendant. See, *e.g.*, *State Farm Fire & Cas. Co. v. Emde*, 706 S.W.2d 543 (Mo. App. 1986). *Res ipsa* has *never* been used to allow an inference of *causation*, nor has it ever placed on a defendant the burden of negating an inference of *causation*, as the Court here does. As stated in *Holloway v. Skelly Oil Co.*, 68 F. Supp. 129 (W.D. Mo. 1946), at 130:

> . . . in no case can the doctrine [of *res ipsa loquitur*] "be invoked *to prove* the fact that an instrumentality did in actuality do any particular thing." [Court's emphasis].

The Court now goes beyond *res ipsa* and places the "burden of disproof" of causation on defendant.

(vi) Apparently too late for the Court's consideration, *In Re Bendectin Litigation*, 857 F.2d 290 (6th Cir. 1988) appeared in the advance sheets. Considering many of the same authorities, *Bendectin* reaches a conclusion opposite to this Court's in respect to the "sub-

stantial factor" doctrine, one of the underpinnings of the Court's reasoning, *id.*, at 310-311, and shows the Court clearly misapplied the "substantial factor" test in this case. A re-hearing should be ordered to reconsider whether *Bendectin* is applicable here.

(vii) Three Missouri cases are cited to support use of the "substantial factor" test. None of them factually or legally direct use in this case. *Chism, Ricketts,* and *Giles* are all intervening force or superseding cause cases where the alleged wrongdoer was clearly negligent and had generated the force to cause the easily identified resulting injury.

(viii) The Court's opinion extensively cites and relies on *Allen v. U.S.*, 588 F. Supp. 247, 404-429 (D. Utah 1984). *Allen* involved 24 plaintiffs seeking to recover for cancer or leukemia allegedly caused by A.E.C. testing of atomic devices prior to 1963. *Allen* was reversed by the Tenth Circuit, which ruled A.E.C. policy judgments were discretionary, and thus protected by immunity, 816 F.2d 1417 (10th Cir. 1987). The Tenth Circuit did not address the causation issues considered by the district court.

In relying on *Allen*, the Court clearly overlooked or misinterpreted much of *Allen*'s facts and law. Nor does it note much of the law cited in *Allen* as to causation does not accord with Missouri law.

At pp. 249-261, the Court appears to adopt a "substantial factor" theory of causation for a "toxic tort" case, leaving the "but for" theory to "the traditional action for personal injury." It seems to be implied the basis for so doing is this case presents a setting where "two causes concur to bring about an event, and either one of them, operating alone, would have been sufficient to cause the identical result." It is further stated evidence

for "but for" causation was "unavailable" because of defendant's acts or omissions, thus apparently excusing an admitted absence of required evidence.

The Court overlooked the clear fact that in *Allen*, before causation was considered, each plaintiff was required to show he was in fact exposed to radiation at levels greater than natural background radiation, and that the injury resulting from the exposure was biologically and statistically consistent with the types of effects known to be caused by radiation, 588 F. Supp. at 415, 428-29. Epidemiologic data was largely relied on to determine these matters.

The Court clearly overlooks this requirement in *Allen*, in that no such *de minimis* exposure identification and quantification threshold is imposed here before plaintiffs are permitted benefit of what the Court fashions as its "substantial factor" test. While the Court states the first item of proof in a "toxic tort" case, pp. 259 and 368-69, Court's opinion, is "an exposure to an identified harmful substance significant enough to activate disease", it fails to require that such significant exposure, *i.e.*, dosage, be established by requisite levels of proof.

In addition, the Court overlooks or misinterprets *Allen*'s reliance for the "substantial factor" test on *Summers v. Tice*, see 588 F. Supp. at 407, 410-411, and *Sindell v. Abbott Laboratories*, see 588 F. Supp. at 408-9. Both are California cases, and have been rejected in Missouri for proving causation; see *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 244 (Mo. banc 1984).

(ix) The Court must have overlooked the ramifications of its new, drastic five-step test, p. 259, Court's opinion, which radically alters all previously-held notions of tort proof. Illustratively, its fourth step requires only

that an expert testify plaintiff's disease "is consistent" with exposure to the harmful substance. This is contrary to all previous, traditional requirements of tort proof. Did the Court really intend to create so drastic a reduction of proof, on the basis of some legal articles, and without judicial authority?

(c) The jury was given Instruction No. 9, the negligence verdict-director; the resulting verdicts can at best be deemed to establish the fact of injury. The verdicts most definitely did *not* establish the nature and extent of any such injury, or the damages flowing therefrom. Yet the Court's opinion seems to indicate, p. 369, Court's opinion, defendant will be precluded on re-trial from contesting the nature and extent of plaintiffs' injuries. If so, the Court has overlooked the rule of law that only those matters unambiguously and necessarily decided by the jury are resolved by a general verdict. *Herrera v. Reicher*, 608 S.W.2d 539 (Mo. App. 1980).

(d) The Court apparently rules defendant is liable for punitive damages, and it only remains for the jury to determine their amount. If so, the Court has overlooked its own rulings, and those of the Supreme Court—as well as MAI 10.02 itself—requiring there first be a finding of an amount of actual damages before there can be any findings of liability for and extent of punitive damages.

The cases overlooked by the Court are typified by *State ex inf. v. Kansas City Firefighters*, 672 S.W.2d 99, 126 (Mo. App. 1984) [Judge Shangler: "An award of punitive damages rests only on a predicate of compensatory damages"]. See also *Compton v. Williams Bros.*, 499 S.W.2d 795 (Mo. 1973). Indeed, MAI 10.02, while combining both punitive damage liability and the amount of damages, first expressly requires a prior finding as

to actual damages. The Court clearly overlooked this requirement.

(e) The Court's opinion gingerly skirts discussion of the trial court's rulings on the constitutionality of the jury's punitive damage award. The trial court held the punitive damage submission violates Art. I, § 21, Mo. Const., as it relates to "excessive fines", and Art. I, § 10, Mo. Const., as it relates to use of a civil burden of proof to punish and deter, thus being a violation of due process guarantees. The Court states the Supreme Court alone may rule on these issues since they involve that court's rule-making powers, p. 358, Court's opinion. Undoubtedly, in doing so, the Court was aware that any decision involving a constitutional provision (as well as the Supreme Court's rule-making power) requires transfer to the Supreme Court, Art. V, §§ 3, 5 and 11, Mo. Const. However, the Court's apparent ruling that defendant is neverthless liable for punitive damages serves to directly involve such constitutional provisions. The Court has clearly overlooked this.

(f) Also involved are the parallel federal constitutional provisions, which are also violated, Amdt. VIII (excessive fines) and Amdt. XIV, § 1 (due process), U.S. Const. See also Application To Transfer To Supreme Court, filed this date.

Respectfully submitted,

Law Office of Alvin D. Shapiro
By /s/ Alvin D. Shapiro
Alvin D. Shapiro - 17806
911 Main Street
2830 Commerce Tower
Kansas City, Missouri 64105
(816) 474-6824

Woodley Law Office
Patrick A. Woodley - 31459
210 Commercial
Post Office Box 1333
Warsaw, Missouri 65355
(816) 438-5601

Law Office of H. Gregory Skidmore
H. Gregory Skidmore
103 South Centre Street
Cumberland, Maryland 21502
(301) 724-3424

Attorneys for Appellant-Respondent

CERTIFICATE OF SERVICE

This is to certify copies of the above and foregoing appellant-respondent's Suggestions in Support of Motion for Rehearing, Or, In The Alternative, Motion for Transfer To Entire Court of Appeals *En Banc*, were hand-delivered this 16th day of November, 1988, to Attorneys for Respondents-Appellants:

Lantz Welch
Tim Brake
2930 City Center Square
Post Office Box 26005
Kansas City, Missouri 64196

Charles Fairchild
Clem Fairchild
4500 Main Street
Kansas City, Missouri 64111

/s/ Alvin D. Shapiro
Attorneys for Appellant-Respondent

(Filed November 16, 1988)

IN THE
MISSOURI COURT OF APPEALS
WESTERN DISTRICT

Case No. WD 38105

BETTY ELAM, et al.,
Respondents-appellants,

v.

ALCOLAC INC.,
Appellant-respondent.

APPLICATION TO TRANSFER TO SUPREME COURT

Comes now Alcolac Inc., appellant-respondent herein, and pursuant to Art. V, §§ 3, 10 and 11, Mo. Const., and to Rule 83.02, Mo.R.Civ.P., respectfully applies to the Court to order transfer of this matter to the Supreme Court of Missouri. As grounds therefor, appellant-respondent states:

1. The Court's opinion and decision involves provisions of the constitution of this state (as well as those provisions of the federal constitution hereinafter identified) of which the Supreme Court has original jurisdiction under Art. V, §§ 3 and 5, Mo. Const., requiring transfer to the Supreme Court, Art. V, § 11, Mo. Const., in that: The Court's ruling reverses both that portion of the trial court's order holding use of MAI 10.02 in this case unconstitutional, and the trial court's further

holdings as to the punitive damages submission being otherwise unconstitutional. Coupled with the Court's apparent ruling that appellant-respondent is nevertheless liable for punitive damages, it raises state constitutional issues under Art. I, § 2 (equality under law); Art. I, § 10 (due process); Art. I, § 13 (*ex post facto* laws); Art. I, § 14 (open courts); Art. I, § 21 (excessive fines); Art. II § 1 (separation of powers) and Art. V, § 5 (Supreme Court rulemaking); and federal constitutional issues under Amdt. VIII (excessive fines) and Amdt. XIV, § 1 (due process, equal protection), U.S. Const.

Said state (and federal) constitutional provisions are involved by reason of the apparent imposition of liability under MAI 10.02 for open-ended punitive damages, which imposition of liability and the directed assessment of open-ended damages involves the following constitutional issues:

(a) It violates due process requirements by delegating to a civil jury, under a civil burden of proof, punitive functions of both a vague and unlimited nature, Art. I, § 10, Mo. Const.; Admt. XIV, § 1, U.S. Const.; further, said MAI 10.02 may *only* be reviewed by the Supreme Court which promulgated it, Art. V, § 5, Mo. Const.; p. 358, Court's opinion.

(b) It further violates due process by impacting on defendant's right to open courts,* and, since applied only to civil defendants faced with punitive damages, also violates constitutional guarantees of equality under law and of equal protection of laws, Art. I, § 2 (equality

---

*The U.S. Supreme Court refers to this as a "chilling effect" on the right to access to the courts arising from use of unlimited punitive damages, *Bankers Life & Cas. Co. v. Crenshaw*, ... U.S. ....., 108 S.Ct. 1645, 100 L.Ed.2d 62 (1988), at 70, fn. 1; and Justice O'Connor's concurrence, *id.* at 77.

under law), Art. I, § 10 (due process), Art. I, § 14 (open courts), Mo. Const.; Amdt. XIV, § 1, U.S. Const. (due process, equal protection).

(c) It violates constitutional guarantees against "excessive fines," Art. I, § 21, Mo. Const; Amdt. VIII, U.S. Const.

(d) It violates constitutional guarantees of due process, and is akin to an *ex post facto* law; the Court's opinion effecting a radical change in common law principles of causation and of submissibility of claims is based on conduct of up to ten years past and further effects a radical change in the burden of proof, or, as in this case the "burden of disproof" here imposed upon defendant, requiring it to disprove claims made against it; Art. I, § 10 (due process); Art. I, § 13 (*ex post facto* laws), Mo. Const.; Admt. XIV, § 1 U.S. Const. (due process).

(e) The Court's radical changes in common law standards in respect to causation and to submissibility of plaintiffs' claims constitute judicial legislation in violation of Art. II, § 1, Mo. Const., providing for separation of powers, with law-making solely the function of the legislative branch.

2. The Court's opinion and decision is of general interest and involves important, vital questions (justifying transfer under Art. V, § 10, Mo. Const., and Rule 83.02, Mo.R.Civ.P.) in that:

(a) This case of first impression involves many and extensive policy decisions. The Court's numerous policy decisions are consciously undertaken. General interest is evidenced by (i) prominent, extended news stories reporting the Court's decision in the Kansas City Star, New York Times, Associated Press, Sedalia Demo-

crat, etc.; (ii) extensive articles on toxic torts and mass pollution claims, appearing in national publications such as Time Magazine, USA Today, etc.; (iii) concern of businesses seeking to locate in Missouri but also seeking definition by Missouri courts of environmental burdens to be imposed upon them; and (iv) concern of other litigants or putative litigants, who are increasingly filing claims based on toxic torts, as well as Missouri lawyers and courts processing such claims.

(b) Important, vital issues and decisions abound throughout the Court's opinion, including (but certainly not limited to) (i) the Court's creation of new, radical standards of causation and of submissibility in respect to "toxic tort" claims, pp. 249-61, Court's opinion; (ii) allowing medical expert opinion on non-medical causation, pp. 294-300, Court's opinion; (iii) acceptance by the Court of "expert" methodology which is not grounded in or endorsed by recognized medical standards and authorities, such as Dr. Carnow's use of "epidemiology" with "bias" groups, and without control groups, and undertaken solely for purposes of litigation, p. 300-312, Court's opinion; (iv) major expansion of the scope allowed expert opinion, and endorsement of radically different methods of diagnosis, clearly contrary to what is allowed in other jurisdictions and to what has heretofore been allowed in Missouri courts, which is of decisive interest and importance to Missouri courts and lawyers, and to the administration of justice in Missouri; and (v) continued daily use of MAI 10.02 in almost every court in the state, with serious constitutional questions raised concerning such MAI 10.02, requiring adjudication by the Supreme Court, the only Missouri court empowered to pass on such issues.

(c) The constitutional issues arising from the Court's imposition of liability for cpen-ended punitive damages (see 1., *supra*) are of growing and widespread importance and interest, see *e.g.*, Judge Donnelly's concurrence in *Hoover's Dairy, Inc. v. Mid-America, etc.*, 700 S.W.2d 426, 437 (Mo. banc 1985); Justice O'Connor's concurrence in *Bankers Life & Cas. Co. v. Crenshaw*, ... U.S. ....., 108 S. Ct. 1645, 100 L.Ed.2d 62, 77 (1988); and *Colonial Pipeline Co. v. Brown*, 365 S.E.2d 827, 829-833 (Ga. 1988). They should be reviewed by the Supreme Court.

3. To the extent that the Court might be supported by *Hoover's Dairy, Inc. v. Mid-America, etc.*, 700 S.W.2d 426 (Mo. banc 1985) in its interpretation of the mental state required by MAI 10.02 to award punitive damages, as asserted by the Court, pp. 359-360, Court's opinion, such existing law should be re-examined. The Court's interpretation of *Hoover* would virtually support punitive damages on a negligence standard alone. If the interpretation is justified, such existing law stated in *Hoover* needs to be re-examined.

4. This motion is in the alternative to the Motion for Rehearing, Or, In The Alternative, Motion to Transfer to Entire Court of Appeals, *En Banc*, filed contemporaneously herewith.

Law Office of Alvin D. Shapiro
By /s/ Alvin D. Shapiro
Alvin D. Shapiro - 17806
911 Main Street
2830 Commerce Tower
Kansas City, Missouri 64105
(816) 474-6824

Woodley Law Office
Patrick A. Woodley - 31459
210 Commercial
Post Office Box 1333
Warsaw, Missouri 65355
(816) 438-5601

Law Office of H. Gregory Skidmore
H. Gregory Skidmore
103 South Centre Street
Cumberland, Maryland 21502
(301) 724-3424

Attorneys for Appellant-Respondent

CERTIFICATE OF SERVICE

This is to certify copies of the above and foregoing appellant-respondent's Application to Transfer to Supreme Court, and Suggestions In Support thereof, were hand-delivered this 16th day of November, 1988, to Attorneys for Respondents-Appellants:

Lantz Welch
Tim Brake
2930 City Center Square
Post Office Box 26005
Kansas City, Missouri 64196

Charles Fairchild
Clem Fairchild
4500 Main Street
Kansas City, Missouri 64111

/s/ Alvin D. Shapiro
Attorney for Appellant-Respondent

(Filed November 16, 1988)

IN THE
MISSOURI COURT OF APPEALS
WESTERN DISTRICT

Case No. WD 38105

BETTY ELAM, et al.,
Respondents-appellants,

v.

ALCOLAC INC.,
Appellant-respondent.

SUGGESTIONS IN SUPPORT OF APPLICATION TO TRANSFER TO SUPREME COURT

Tracking the points raised in our Application To Transfer To Supreme Court:

1. The Supreme Court has original jurisdiction of all matters involving provisions of the Missouri constitution, Art. V, § 3, Mo. Const.; any such matters must be transferred to the Supreme Court, Art. V, § 11, Mo. Const.

(a-c) The trial court ruled use of MAI 10.02 was here unconstitutional. This Court held such constitutional challenge to MAI 10.02, formulated pursuant to the Supreme Court's rule-making powers, Art. V, § 5, Mo. Const., could only be taken up with the Supreme Court itself, p. 358, Court's opinion. Other state and federal constitutional issues are set out in 1. of our Application To Transfer and are involved in respect to

the punitive damage submission. These include primarily the constitutional prohibition against excessive fines, Art. I, § 21, Mo. Const. (Amdt. VIII, U.S. Const.) and MAI 10.02's use of a civil burden of proof, as opposed to what should be a stricter burden of proof, to accomplish MAI 10.02's express aim of punishment and deterrence, with open-ended liability for punitive damages, Art. I, § 10, Mo. Const. (Amdt. XIV, § 1, U.S. Const.). The Court's apparent ruling that defendant is liable for punitive damages makes adjudication on these state and federal constitutional issues unavoidable. Transfer to the Supreme Court is required.

(d-e) As noted in our alternative Motion for Rehearing, etc., filed this date, the Court's decision creates new, radical standards of causation and of submissibility in respect to "toxic tort" claims. Such judicial action raises substantial constitutional questions, of which the Supreme Court has exclusive jurisdiction, Art. V, § 3, Mo. Const., requiring transfer to that court. For example, creation of such major, new standards by which past conduct—up to ten years prior to this decision—is judged raises serious questions of due process, Art. I, §§ 10 and 13, Mo. Const. (Admt. XIV, § 1, U.S. Const.). It creates further questions concerning judicial legislation, Art. II, § 1, Mo. Const. These constitutional issues arise from the Court's opinion itself and require transfer to the Supreme Court.

2. The general interest and importance justifying transfer to the Supreme Court appears in several respects:

(a) This is a case of first impression. In reaching its decision, the Court makes numerous, extensive policy decisions, which impact not only on "toxic

tort" claims, but on methods of conducting business and manufacturing operations in the State of Missouri. Accordingly, many publications and media have given prominent, extensive coverage both to this case itself and to the more general area of toxic tort claims. Businesses seeking to locate in Missouri want to know in advance what burdens and obligations will be imposed upon new enterprises locating in this state. Further, Missouri courts and lawyers increasingly process "toxic tort" claims. It is no exaggeration to state this case will directly govern most of the issues and procedures involved in "toxic tort" litigation. *Kennedy v. Union Electric*, 203 S.W.2d 489, 491 (Mo. App. 1947), dealt with power and flood control dams; the fact that many Missourians were involved with power and flood control dams was deemed sufficient general interest and importance to require transfer to the Supreme Court.

(b) The numerous vital issues decided include new standards of submissibility and of causation; the extent and role of expert medical opinion and the scientific basis for such opinion; and criteria for epidemiological proof and medical diagnosis. Further, the issue of MAI 10.02's constitutionality was raised but not decided; yet the Court's apparent disposition was such as to leave the question in the case. MAI 10.02 is used daily in almost every Missouri court. A ruling as to its validity, after the trial court had ruled it to be invalid, is of the utmost general importance and interest.

A substantial part of the Court's opinion puts its judicial stamp of approval upon plaintiffs' medical expert. Without re-arguing matters raised in our briefs, suffice it to say Dr. Carnow's methodology is controversial. This judicial approval will be perceived to de-

fine and approve large new areas of expert testimony and types of proof in Missouri courts. Dr. Carnow's methodology does not incorporate what has heretofore been deemed to be basic and accepted principles of epidemiology. See pp. 279, 298, Court's opinion. Accordingly, such ruling in respect to expert testimony is of vital interest and importance to the bar and to the courts. Increasingly, environmental lawsuits involve a variety of expert testimony that mandates, as a matter of law, close analysis of the expert's opinion and its underlying basis. *Richardson v. Richardson-Merrell, Inc.*, ... F.2d ..... (D.C. Cir. Sept. 27, 1988); *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1208 (6th Cir. 1988); *Viterbo v. Dow Chemical Co.*, 826 F.2d 420, 422-4 (5th Cir. 1987); and *Johnston v. U.S.*, 597 F. Supp. 374, 415 (D. Kan. 1984). Courts in other jurisdictions have rejected Dr. Carnow's opinions. *Stites v. Sundstrand Heat Transfer, Inc.*, 660 F. Supp. 1516, 1521 and 1525 (W.D. Mich. 1987); *Boggess v. Monsanto Co.*, 81-2098-265 (D.C. S.D.W. Va. 1985), cited at pp. 301, 307 of Court's opinion; and *In re Agent Orange Product Liability Litigation, Anna M. Lilley*, 611 F. Supp. 1267, 1280-3 (E.D. N.Y. 1985), cited and discussed pp. 307-310, Court's opinion.*

---

*The Court's opinion endorses an expert about whom Judge Weinstein ruled: "[T]here are no facts that rationally support Dr. Carnow's opinion . . . Dr. Carnow's assumption that Mr. Lilley was exposed to no toxic substance other than Agent Orange during his lifetime is baseless . . . Dr. Carnow's resort to inappropriate studies of animals and workers . . . cannot redeem his unfounded opinion . . . The unfounded assumptions and speculation underlying Dr. Carnow's testimony reduce its probative value to a point approaching zero . . . The false aura of scientific infallibility surrounding Dr. Carnow's opinion makes the court particularly reluctant to admit it." 611 F.Supp. at 1283.

(c) The constitutionality of punitive damages is currently of extensive interest and of vital importance. It was noted in Judge Donnelly's concurrence in *Hoover's Dairy, Inc. v. Mid-America, etc.*, 700 S.W.2d 426, 437 (Mo. banc 1985) [punitive damages may violate due process guarantees of Art. I, § 10, "by delegating punitive functions to private litigants and civil courts."] and in Justice O'Connor's recent concurrence (with Justice Scalia) in *Bankers Life & Cas. Co. v. Crenshaw*, ... U.S. ....., 108 S. Ct. 1645, 100 L.Ed.2d 62 (1988). Justice O'Connor stated:

> Appellant has touched on a due process issue that I think is worthy of the Court's attention in an appropriate case. Mississippi law gives juries discretion to award any amount of punitive damages in any tort case in which a defendant acts with a certain mental state. In my view, because of the punitive character of such awards, there is reason to think that this may violate the Due Process Clause.
>
> Punitive damages are awarded not to compensate for injury but, rather, "to punish reprehensible conduct and to deter its future occurrence." . . . Punitive damages are not measured against actual injury, so there is no objective standard that limits their amount. Hence, "the impact of these windfall recoveries is unpredictable and potentially substantial." . . . [T]he Court should scrutinize carefully the procedures under which punitive damages are awarded in civil lawsuits.
>
> Under Mississippi law, the jury may award punitive damages for any common law tort committed with a certain mental state, that is, "for a willful and

> intentional wrong, or for such gross negligence and reckless negligence as is equivalent to such a wrong." . . . Although this standard may describe the required mental state with sufficient precision, the amount of the penalty that may ensue is left completely indeterminate. As the Mississippi Supreme Court said, "the determination of the amount of punitive damages is a matter committed solely to the authority and discretion of the jury." . . . This grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process. The Court has recognized that "vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute." *U.S. v. Batchelder*, 442 U.S. 114 (1979).

100 L.Ed.2d at 78.

In addition, state courts have commenced ruling on the same constitutional issue of "excessive fines" cited by the trial court here. In *Colonial Pipeline Co. v. Brown*, 365 S.E.2d 827 (Ga. 1988), the Georgia Supreme Court ruled an award of punitive damages constituted an "excessive fine," prohibited by Georgia's equivalent of Amdt. VIII, U.S. Const., and Art. I, § 21, Mo. Const. If only because punitive damages are a daily issue in many cases throughout Missouri, their constitutionality (and manner of submission) must be taken up by the Supreme Court.

3. The Court cites the Supreme Court's *Hoover* opinion to support its interpretation of MAI 10.02, pp. 359-360, Court's opinion. The Court asserts MAI 10.02's phrase "complete indifference or conscious disregard", is defined in *Hoover* to mean defendant "knew or had

reason to know" of "a high degree of probability the action would result in injury." If this interpretation is correct, *Hoover* virtually reduces the prescribed mental state required for punitive damages to that of negligence; such statement of existing law needs to be re-examined.

Respectfully submitted,

Law Office of Alvin D. Shapiro
By /s/ Alvin D. Shapiro
Alvin D. Shapiro - 17806
911 Main Street, Suite 2830
Kansas City, Missouri 64105
(816) 474-6824

Woodley Law Office
Patrick A. Woodley - 31459
210 Commercial
Post Office Box 1333
Warsaw, Missouri 65355
(816) 438-5601

Law Office of H. Gregory Skidmore
H. Gregory Skidmore
103 South Centre Street
Cumberland, Maryland 21502
(301) 724-3424
Attorneys for Appellant-Respondent

CERTIFICATE OF SERVICE

This is to certify copies of the above and foregoing appellant-respondent's Suggestions In Support of Application To Transfer To Supreme Court, were hand-delivered this 16th day of November, 1988, to Attorneys for Respondents-Appellants:

Lantz Welch
Tim Brake
2930 City Center Square
Post Office Box 26005
Kansas City, Missouri 64196

Charles Fairchild
Clem Fairchild
4500 Main Street
Kansas City, Missouri 64111

By /s/ Alvin D. Shapiro
Attorney for Appellant-Respondent